

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF ARIZONA
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5 **In Re: Bard IVC Filters**) MD-15-02641-PHX-DGC
6 Products Liability Litigation)
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8) Phoenix, Arizona
9) October 5, 2017
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BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SCHEDULING CONFERENCE

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P R O C E E D I N G S

THE COURT: Counsel, let's talk about a number of issues. The first thing I want to mention is the information I asked Bard to file about this recent disclosure of Vanguard ownership of Bard.

The reason I asked the question is because Vanguard Group appeared in a supplemental disclosure statement a month or so ago, and through an investment adviser, I own, I think, interests in two Vanguard mutual funds. And so when the name popped up, the conflict popped up given what I've got in the system for conflicts.

I was hoping to learn more about the nature of where Vanguard owns its interest. I inferred from what you provided, Mr. North, that this 10.73 percent of Bard stock is owned in different Vanguard funds. Is that the idea?

MR. NORTH: That's our understanding, Your Honor.

THE COURT: Okay. Well, there is a judicial ethics opinion, it is Advisory Opinion Number 106 from the Committee on Codes of Conduct. Canon (C)(1)(c) of the Code of Judicial Conduct requires a judge to disqualify himself or herself when the judge knows that he or she "has a financial interest in the subject matter in controversy or in a party to the proceeding." Or when the judge has "any other interests that could be affected substantially by the outcome of the

15:05:39 1 proceeding."

2 But later in the canons there is a definition of what
3 a financial interest is, and it says, "Ownership in a mutual
4 or common investment fund that holds securities is not a
15:05:58 5 'financial interest' in such securities unless the judge
6 participates in the management of the fund." And that is
7 Section 3(C)(3)(c)(i). And I certainly don't participate in
8 the management of Vanguard funds.

9 However, in Ethics Opinion 106 what it goes on to say
15:06:26 10 is even if a mutual fund is the nature of the judge's
11 investment, then the judge should consider whether the value
12 of the fund itself could be affected by a ruling in the case.
13 And it says whether or not that's true will depend on, I'm now
14 reading from the opinion, "whether litigation might have a
15:07:00 15 substantial effect on the judge's interest in a fund will
16 often turn on the size and diversity of the funds'
17 investments. The value of the mutual fund that invests in
18 many companies in a variety of industries would rarely be
19 substantially affected by the outcome of litigation involving
15:07:20 20 one particular company. In contrast, a mutual fund that
21 invests in only a few companies in a particular industry would
22 be more likely to be substantially affected by certain types
23 of litigation."

24 So what I will do, since it appears Bard doesn't
15:07:40 25 know, is I will ask my investment adviser to give me a better

15:07:47 1 sense. And the funds I own an interest in I think are just
2 general corporate funds. They're not health care company
3 funds or manufacturing funds. I think one is large cap
4 growth. And there's other one. I will get a sense whether
15:08:04 5 Bard is more than a small holding in those funds. And if it's
6 not, then I think the ethics opinion says it's okay. If it is
7 for some reason, then I will talk to you all, but I'll likely
8 tell my adviser to sell that fund and put me in something that
9 doesn't involve Bard holdings.

15:08:24 10 I explain that all to you so you can think about it,
11 let me know if you have additional thoughts or concerns
12 arising from this. I'm happy to get input from you.

13 Mr. North.

14 MR. NORTH: Your Honor, I wanted to note for the
15 Court, too, of course, that the acquisition of Becton
16 Dickinson of Bard is scheduled to take place in the fourth
17 quarter, and assuming that that acquisition does go forward --
18 that's the explanation for the volatility in the Bard stock
19 now. If that goes forward, then Vanguard's share of the
15:08:53 20 merged company will be very diluted, and who knows where it
21 will end up. And that could happen within two months or so.

22 THE COURT: Okay.

23 Mr. Lopez, did you have any thoughts on this issue?

24 MR. LOPEZ: My thoughts are, Your Honor, that we
15:09:13 25 certainly don't, based on what Your Honor's just outlined for

15:09:17 1 us, we certainly don't see any reason why you should recuse
2 yourself or why we should ask you to.

3 THE COURT: Okay. Well, I do think I should look to
4 make sure that there's not something unusual about Vanguard's
15:09:33 5 holding in Bard that means it has a disproportionate effect on
6 the fund. I'd be very surprised. I think the Vanguard funds
7 are pretty broadly invested. But if there's anything like
8 that, I will let you know so we can decide what ought to
9 happen, and if somebody has an objection they can certainly
15:09:52 10 make it.

11 I'd like to talk last about scheduling of the
12 bellwether trials, which is one of the issues you raised in
13 the joint report.

14 Here's what I'd like to talk to you about. Well,
15:10:15 15 actually, let's take up the discovery issue first and then
16 come back to how we do the hearings on the motions for summary
17 judgment and the *Daubert* motions.

18 As I read your joint report, I was uncertain as to
19 what the parties' positions -- not what their positions were
15:10:42 20 but how to square them. Here was my uncertainty: One of the
21 issues that's been raised concerns expert communications with
22 experts where an attorney might be involved. And at the
23 bottom of page 13 of your joint report the plaintiffs say, I'm
24 reading line 25, "Plaintiffs' counsel has reviewed the
15:11:05 25 communications involving experts and produced expert-to-expert

15:11:10 1 communications regardless of whether attorneys were copied on
2 the e-mails."

3 When I get over to page 15 and Bard's position, it
4 says at the bottom of page 15, line 24, "Plaintiffs should
15:11:26 5 produce or log any e-mail communication 'From:' an expert
6 where another expert is recipient of the e-mail regardless of
7 the lawyer's presence on the e-mail."

8 Sounds like the plaintiffs are saying we've produced
9 those. Bard is saying you should produce them or log them.

15:11:45 10 MR. STOLLER: Your Honor, might I explain?

11 THE COURT: Yeah. Please.

12 MR. STOLLER: I'll tell you, because I'm the one who
13 did the review and I went back again last night and reviewed
14 the e-mails, the reference on page 13 is we have produced any
15:12:00 15 what I would characterize as expert-to-expert communications.
16 One expert talking to another expert, even if lawyers were
17 copied on that.

18 I distinguished that from, and I think this is where
19 the rub is between the parties, most of these e-mails are
15:12:16 20 multiple experts, multiple lawyers. Typically starting with
21 lawyer to experts, maybe another lawyer cc'd on it, and then
22 series of replies and responses back and forth in a longer
23 e-mail chain. In that context, there's To's, From's, cc's,
24 and they change. I would equate that with a conversation in a
15:12:39 25 room where we're all talking. The fact that who's on any

15:12:44 1 particular line may not have any significance because who's on
2 what line has more to do with the e-mail below than the e-mail
3 itself, if that makes sense.

4 In that context there are e-mails, I believe, at
15:12:57 5 least that have an expert on the From line and an expert on
6 the To line, as well as lawyers either in the cc line or also
7 in the To line.

8 The analysis we did -- or I should say the analysis I
9 did was to read all of the substance of those e-mails and
15:13:14 10 determine are those really just communications from Expert A
11 to Expert B and the lawyers just happen to be on the e-mails?
12 Or is it part of a larger conversation involving the experts
13 and the lawyers back and forth?

14 With respect to the former category, if it was just
15:13:32 15 Expert A talking to Expert B, we produced those. Even if the
16 lawyers were on the cc line or on a To line. And they should
17 at least know that because a number of the e-mails that we
18 produced that were expert to expert have lawyers on them.

19 I distinguish that from those larger communications
15:13:50 20 that are expert to attorney or attorney to expert but that To
21 and From lines don't necessarily reflect who it's from and who
22 it's to.

23 Does that make sense?

24 THE COURT: Yes.

15:14:03 25 MR. STOLLER: Okay. That's the distinction I draw.

15:14:06 1 We have produced all of the ones that are truly Expert A
2 talking to Expert B. We have not produced all of the
3 experts -- excuse me, all the communications where you may
4 have an expert on the From line and also on the To line.

15:14:19 5 THE COURT: And the distinction you've drawn, as I
6 understand it, is your judgment that the topic of those
7 e-mails you have not produced are essentially attorney-expert
8 communications? Is that --

9 MR. STOLLER: Yes. And I can give you some solid
15:14:35 10 examples. One example will be lawyer sends an e-mail to
11 Experts 1 through 4 copies Lawyer 2 on it. So From line is
12 Lawyer A, To line is Expert 1, 2, 3, 4, cc line is Lawyer 2.
13 And perhaps it asks a question: Experts, tell me what you
14 think on this.

15:14:57 15 Expert 1 responds. So the next e-mail will say From
16 Expert 1 To Lawyer 1, and cc'd all of the other folks.
17 Experts 2, 3, 4, and Lawyer 2.

18 Expert 2 then responds. In the chain of e-mails his
19 response would be to the e-mail just from Expert 1, but what
15:15:19 20 he's actually doing is responding to the question in the first
21 e-mail. But his e-mail would read From Expert 2 To Expert 1,
22 and maybe Attorney 1 as well, I'm not sure, I could pull up
23 some examples, with cc's of all the other folks.

24 The From and To line don't necessarily tell you to
15:15:36 25 whom the communication is being made. And in that case the

15:15:39 1 expert is responding to the lawyer question. Right? Which
2 was, because of the way e-mail plays out, the From and To
3 lines look as if he's responding to the first expert but
4 that's not what the response is; you have to actually read the
15:15:54 5 substance to understand it's a response here.

6 In a larger context, these are communications that
7 don't say, hey -- because the To and From lines aren't
8 necessarily indicative, they don't say in the body of the
9 e-mail, Expert 1 tell me this, Expert 2 tell me this, Lawyer 1
15:16:14 10 tell me this. They're more akin to a conversation where
11 Mr. Lopez asks a question, the experts respond, perhaps I
12 chime in in the next e-mail and say what about these things,
13 Expert 2 may respond to me or to Ramon's original e-mail or,
14 in fact, to clarify something that Expert 1 said in response
15:16:33 15 to his first one.

16 I have -- all I can tell Your Honor, in the same way
17 that if it didn't involve multiple experts, when you go
18 through and you review those communications you have with your
19 experts and you do your 26(b)(4)(C) analysis to see, does this
15:16:50 20 fall under exceptions of 1, 2 or 3, and you look to say what's
21 the content of it, that's what we did here is determine what
22 is the content and who is the communication actually between.

23 We produced the ones actually between the experts and
24 where lawyers just happen to be on the e-mails. We did not
15:17:07 25 produce the ones where the lawyers were active participants in

15:17:11 1 the conversation.

2 THE COURT: Okay.

3 Mr. North.

4 MR. NORTH: Mr. Lerner is going to address this.

15:17:19 5 MR. LERNER: Your Honor --

6 THE COURT: Pull the mic over, would you.

7 MR. LERNER: At the last -- can you hear me?

8 THE COURT: Yeah.

9 MR. LERNER: At the last conference the Court ordered
15:17:27 10 the privilege log. And there very well may be some of the
11 communications are protected, but without a privilege log we
12 can't really test that. It's a very unique situation when you
13 have joint experts. I've looked at the case law, there's not
14 really a discussion about this particular issue with joint
15:17:45 15 experts.

16 So what I was going to propose, since we've kind of
17 reached an impasse about this issue, is the reason why the
18 privilege log is helpful, I was going to suggest like when you
19 did a privilege log review when they were challenging Bard's
15:18:00 20 privilege log, you did an in-camera review of a limited amount
21 of documents.

22 In this situation it might be helpful for you to
23 review, if you're able to do it, 10 or 15 of the e-mail chains
24 to provide some guidance to the parties.

15:18:14 25 The reason why a privilege log would be helpful with

15:18:16 1 that is we can do a randomization of that so you have a
2 sampling of 10 or 15 documents.

3 I'm not sure if the privilege log would give us
4 enough information or not to be able to tell whether the
15:18:29 5 communications are protected or not. But this is a very
6 fact-intensive exercise and that's why, in thinking about a
7 solution to this, I thought the solution we came up with last
8 time for Bard's privilege log would be an in-camera inspection
9 of a limited number of documents that provides guidance to the
10 parties, and that may help resolve the issue like you did last
11 time.

12 THE COURT: Okay.

13 Mr. Stoller, what are the numbers we're talking
14 about?

15:18:56 15 MR. STOLLER: Dozens if not hundreds of e-mails,
16 which is why I said -- the privilege log issue for me is one
17 of it doesn't provide any information that's helpful to this
18 analysis, right? If the To, From, and cc lines aren't
19 telling, the only other thing you're going to have is it's an
15:19:11 20 e-mail, the date. The subject matter of the conversation is
21 protected under 26(b) whatever, (4) (C), anyway and doesn't
22 make a distinction in terms of discoverability unless it's one
23 of the exceptions of 1, 2, and 3, which we've already given to
24 them. So that line doesn't make any difference.

15:19:30 25 And then the only other thing you're going to get is

15:19:31 1 we're withholding it based on 26(b)(4)(C).

2 So a privilege log won't make a difference. All that
3 will do is identify the e-mail. It won't provide the
4 information to the challenge they're purporting to make.

15:19:44 5 If you ask me the number of e-mails, I couldn't tell
6 you because, for example, given the threading, I may have four
7 copies of the same e-mail at different stages and times. But
8 there are dozens if not 100, 100-plus e-mails.

9 Categorically, again, I'll tell you, I did it twice.
15:20:01 10 I did it weeks ago when we did the first production, I did it
11 again last night to make sure, okay, is there anything in here
12 that's expert to expert that might be subject to it? And I've
13 got to go do a couple confirmations on two e-mails with my
14 co-counsel to see if there's an issue there, but beyond that,
15:20:18 15 Your Honor, they're group conversations and the lawyers are
16 intimately and integrally involved in them.

17 THE COURT: What is your thought on Mr. Lerner's
18 suggest of an in-camera review?

19 MR. STOLLER: Your Honor, I -- here's the thing, Your
15:20:34 20 Honor. We could do this on everything. We could do this on
21 everything we subpoena from them and subpoena from us and
22 throw things at you. I don't think it's a use of time.
23 Either -- either we trust the process and the people producing
24 documents or we don't. If they tell me they don't trust me,
15:20:54 25 then I suppose the only way to resolve that is to have an

15:20:57 1 in-camera review.

2 THE COURT: Any other thoughts? I'm not going to ask
3 you if you trust Mr. Stoller, Mr. Lerner, but do you have any
4 other thoughts?

15:21:07 5 MR. LERNER: I've enjoyed working with Mr. Stoller on
6 this privilege issue over last month and I do trust him and
7 just as I hope he trusts us, we still had to produce thousands
8 of pages of privilege logs ourselves. They didn't completely
9 trust us. And I'm okay with that.

15:21:21 10 But at the end of the day, I think a limited -- it's
11 very fact intensive. So I think different people's opinions
12 could change the analysis. So I think it would be helpful to
13 have a limited review. I understand Your Honor has a lot of
14 stuff going on. Whatever you think is reasonable. If it's
15:21:37 15 ten e-mails, so be it. If it's -- I think that would help
16 resolve the issue.

17 THE COURT: And I think your point is the reason you
18 want a privilege log is so you can choose at random the 10?

19 MR. LERNER: I also think -- I don't know --
15:21:48 20 Mr. Stoller said that the privilege log that they would create
21 would not be of any help. In your order you said provide the
22 privilege log that specifically provided specific basis on
23 which the plaintiffs conclude that the communications are
24 protected. I understand they don't necessarily want to do a
15:22:06 25 privilege log. We didn't necessarily want to do a privilege

15:22:08 1 log for all the documents we logged. It's part of the
2 process.

3 MR. STOLLER: If I might, Your Honor. I think the
4 difference here is these are single objection. It's
15:22:16 5 categorical. The log's not going to make a difference between
6 whether I say e-mails --

7 THE COURT: I understand --

8 MR. STOLLER: Let me make a second point, if I might,
9 Your Honor. On the privilege, what they're proposing, the
15:22:28 10 in-camera inspections you did were to addressing categories of
11 things and make a decision, is this privileged or not, that
12 could be applied across a larger number. That's not what
13 would happen here. You would look at one and say "I disagree
14 with Mr. Stoller's analysis" or "I agree," and all that's
15:22:46 15 going to tell you about is that single e-mail.

16 Unless you're going to review all of them, there's no
17 way to apply whatever you're going to do in that in-camera
18 review across the greater --

19 THE COURT: When you started, Mr. Stoller, you held
15:22:59 20 up a folder. Is that all of them? Is that all of them?

21 MR. STOLLER: That is all of them.

22 THE COURT: Rather than -- it seems to me we could
23 do -- if we're going to take up Mr. Lerner's suggestion, we
24 could do it in one of two ways. You can write those out in a
15:23:11 25 privilege log and he can pick ten or you could produce that in

15:23:14 1 camera and we'll pick ten. And we'll look through them and
2 see if we agree with you that those are privileged. And if
3 so, we'll say so.

4 MR. STOLLER: I'm happy to give it to you, Your
15:23:26 5 Honor. I'll have to make another set --

6 THE COURT: It saves you the time --

7 MR. STOLLER: I'm much happier to give it to you and
8 have you randomly draw.

9 THE COURT: It makes it random for your purposes.
15:23:37 10 We'll go through and pick every third and look at ten, and
11 that resolves the issue and you don't have to spend time
12 writing a privilege log.

13 MR. STOLLER: We'll do that, Your Honor. I'll have
14 to make a new set of these, but I'll do that.

15:23:51 15 THE COURT: If you can get it to us by the end of
16 next week, we'll do that.

17 MR. STOLLER: Okay.

18 MR. LERNER: Thank you, Your Honor.

19 THE COURT: Now, there's a different privilege log
15:24:02 20 issue, I think, that the defendants are raising, which is the
21 sufficiency of the plaintiffs' obtaining communications from
22 their experts.

23 MR. LERNER: Your Honor, the issue again, the issue
24 with the joint experts, with Northwestern doctors, there's
15:24:20 25 four doctors, and we have some concerns they haven't looked at

15:24:22 1 all the places they need to look at in order to determine what
2 e-mails exist.

3 The issue is that plaintiffs made the point that the
4 Northwestern doctors work together and so they communicate all
15:24:32 5 the time by e-mail and so it would be a burden on them to go
6 through all of the e-mails to try to figure out what documents
7 may be responsive, relevant, for purposes of this case. So
8 instead what the plaintiffs did is they looked at their own
9 servers and determined that.

15:24:50 10 THE COURT: Right.

11 MR. LERNER: The problem with that is they actually
12 produced one document that is communications just among the
13 experts.

14 For them to look at their own servers, I think we're
15:24:59 15 missing some documents. And if they want to impose some
16 limitations or restrictions to look at a certain time period,
17 certain keywords, kind of things we had to do for our
18 employees' ESI, I'm happy to discuss that. Keywords, date
19 restrictions, so we get a more limited and reasonable set of
15:25:16 20 documents for them to review.

21 I'm just concerned if they only reviewed the
22 plaintiffs' e-mail server that documents haven't been
23 reviewed.

24 MR. STOLLER: Your Honor, Mr. Rotman who dealt
15:25:27 25 directly with the experts can correct me if I'm wrong, but we

15:25:30 1 confirmed with the experts. They said every e-mail they had
2 relevant to this litigation and to their -- and to their
3 engagement, they copied the lawyers on. And so it became a
4 question of they have their e-mail servers --

15:25:43 5 THE COURT: I understand that, Mr. Stoller. They
6 made the assertion in the paper and again that you produced
7 e-mails among those four doctors that don't copy a lawyer. I
8 think his point is if the doctors told you that, it's not
9 accurate because they've got an e-mail that doesn't include a
15:25:59 10 lawyer.

11 MR. STOLLER: If you point it out to me I can
12 probably address it, but to my knowledge we had all -- that
13 wouldn't be possible because we collected the e-mails from the
14 hospital --

15:26:12 15 THE COURT: Do you have it, Mr. Lerner? Show it to
16 Mr. Stoller, would you.

17 (Counsel confer.)

18 MR. STOLLER: I've seen it, Your Honor. And Steve
19 can correct me if I'm wrong, we talked with the doctors and
15:27:05 20 they said to their knowledge everything's done, they have
21 given us everything they have. And that e-mail he's referring
22 to didn't come from somewhere else, it came from Hausfeld
23 servers.

24 THE COURT: Is Hausfeld copied on that e-mail?

15:27:23 25 MR. STOLLER: The email he -- no, it got forwarded to

15:27:24 1 them after.

2 THE COURT: Forwarded to Hausfeld?

3 MR. STOLLER: Correct.

4 THE COURT: So it was internal communication among
15:27:34 5 the experts without Hausfeld and then one of them forwarded it
6 to Hausfeld?

7 MR. STOLLER: Correct. Apparently they fixed it
8 after the fact.

9 THE COURT: Will you follow up with them on that,
15:27:44 10 because it sounds like there was an e-mail that was just among
11 the experts and no lawyer copied and then one of them
12 forwarded it.

13 MR. STOLLER: That's correct.

14 THE COURT: It sounds like there has been e-mails
15:27:52 15 just among the experts not copied to Hausfeld. I think you
16 should follow up and just make sure since it happened in that
17 instance that it didn't happen in others that weren't
18 forwarded.

19 MR. STOLLER: We will do so, Your Honor.

15:28:04 20 THE COURT: Provide -- you got the number?

21 MR. STOLLER: I have it, Your Honor.

22 THE COURT: I'll ask them to do that, and I think
23 they'll find out and address the issue and it will be
24 resolved.

15:28:13 25 MR. LERNER: Thank you, Your Honor.

15:28:14 1 THE COURT: Okay.

2 You also mentioned in the case management report that
3 I had not ruled on the retaking of Dr. Henry's deposition.
4 Frankly, I forgot about this after the last case management
15:28:30 5 conference. This wasn't put on my desk when it came in, so I
6 missed it. I'll get you a ruling on Dr. Henry's deposition in
7 the next week.

8 Let's talk then about other motions. It seems to me
9 we've got four categories of motions. We've got the
15:28:49 10 preemption motion that is now fully briefed as of last week.
11 We've got what I'll call *Daubert* motions. I think there's 13
12 of them, ten filed by the defense and three filed by the
13 plaintiffs, which ask that experts not be permitted to
14 testify. We've got motions to disqualify experts based upon
15:29:19 15 their involvement with other parties earlier in the case.

16 And I think, if I remember correctly, that most of
17 those motions to disqualify concern testifying experts,
18 although one includes some consulting experts.

19 And then we've got motions for summary judgment that
15:29:42 20 seem to me to be related to the bellwether cases. Some are
21 directed at the bellwether plaintiffs, some are directed at
22 affirmative defenses.

23 MR. STOLLER: On that last point, Your Honor, I
24 believe the response on the affirmative defense was -- you all
15:29:57 25 have withdrawn the affirmative defense; is that correct? I

1 think that's not an issue any more, based on our review of
2 your reply. Or response.

3 MR. LERNER: I think the issue was -- I think that's
4 resolved. For the Jones case we were just preserving our
5 right to -- preserve the right for plaintiffs to meet their
6 burden of proof as to causation.

7 THE COURT: Well, let's identify it.

8 MR. STOLLER: Your Honor, Plaintiffs' Motion for
9 Partial Summary Judgment re Affirmative Defense Number 13.
10 It's Docket 7363, I believe. I think that's been resolved by
11 virtue of their response to that in which they withdraw the
12 affirmative defense.

13 THE COURT: So you are withdrawing that affirmative
14 defense?

15 MR. LERNER: Yes, Your Honor.

16 THE COURT: Okay. So do you want us to grant that
17 motion or just deem the affirmative defense withdrawn? Both
18 have the same effect --

19 MR. STOLLER: I'd like you to grant my motion because
20 that always means I won, Your Honor.

21 THE COURT: All right. I'm going to grant that
22 motion so Mr. Stoller's feeling good. We'll grant that as
23 uncontested as Docket 7363.

24 There are some other case-specific motions that have
25 been filed, I think not by lead counsel, and Nancy was going

15:31:19 1 to talk to you all to see if there was any issue we need to
2 resolve.

3 So here's the question I have for you with respect to
4 the four categories of motions: It seems to me we should set
15:31:31 5 an oral argument on the preemption motion. And the question I
6 then have is whether you have views on the best way to hold
7 hearings on the *Daubert* motions.

8 I do not think we should try to hold one hearing on
9 all 13 *Daubert* motions because I try to be prepared before a
15:31:54 10 hearing and, frankly, if we wait until I'm prepared on all 13
11 motions I will have forgotten the first seven by the time we
12 get to that hearing. It will just take too long.

13 So my thought is perhaps we should put the *Daubert*
14 motions into some sort of categories and address them in
15:32:11 15 groups where I can be prepared at the hearing to address all
16 of them in a group. And maybe we include with some of those
17 *Daubert* hearings specific -- well, I think we ought to include
18 motions to disqualify experts when we're addressing the
19 *Daubert* motion on those experts, but I don't know whether we
15:32:32 20 should include summary judgment motions on bellwether
21 plaintiffs' cases. My sense is we really ought to deal with
22 those in advance of trials rather than to tackle them while
23 we're tackling *Daubert* motions.

24 Another question I have, because I just haven't read
15:32:49 25 them all, is whether there are *Daubert* motions that don't go

15:32:52 1 to the case as a whole and are really bellwether plaintiff
2 specific and we ought to hold off and rule on those before a
3 bellwether trial.

4 I'm interested in thoughts you have about the best
15:33:04 5 way to organize these hearings.

6 Pull the mic up, would you, Mr. O'Connor.

7 MR. O'CONNOR: Just thinking, I don't have them all
8 in front of me, some of the *Daubert* motions did address
9 general issues that are across the board and also may address
15:33:27 10 one or two or three of the bellwether plaintiffs. If you're
11 going to cut them anyway to categorize them right here and
12 right now, I think there's *Daubert* motions against medical
13 witnesses and nonmedical witnesses. How many of each, I don't
14 know.

15:33:46 15 THE COURT: Okay.

16 MR. NORTH: Your Honor, my recollection, and this is
17 off the top of my head, there's no more than one or two that
18 have bellwether-specific things in it --

19 MR. O'CONNOR: That may be right.

15:33:55 20 MR. NORTH: -- most are general.

21 But my suggestion would be if the Court could tell us
22 roughly, like, do you want to do three to five in one hearing?
23 Five to seven? Some range?

24 I suspect the two teams could get together and
15:34:08 25 classify them real quick because it might not be exactly

15:34:12 1 efficient to do medical versus nonmedical because some of the
2 medical and nonmedical have the same issue. Like how much can
3 witnesses talk about corporate documents. And that crosses
4 the board, and we can probably do several that have that same
15:34:29 5 issue at one time.

6 I think we could group them by agreement if the Court
7 would give us parameters. Looking at doing them in two
8 hearings? Three hearings? Or what.

9 THE COURT: Okay. Give me just a minute.

15:35:08 10 I'm going to be right back. I'm going to grab my
11 iPad. It's easier to look at the calendar there. I'll be
12 right back in.

13 (Pause in proceedings.)

14 THE COURT: Please be seated.

15:38:36 15 Counsel, let me talk out loud for a minute and get
16 your reaction.

17 I'm looking at the calendar going forward.

18 We, I think, could have a hearing on some of the
19 motions on Friday, November 17th, which is about a little over
15:39:02 20 a month from now. Between now and then I'm completely booked.
21 We could hold a hearing then on some of the motions.

22 I think we could hold another hearing on Friday,
23 December 15th. I'm scheduled to be in a criminal case,
24 criminal trial, in the middle of an eight-day criminal trial
15:39:33 25 that day, but based on developments in the case I'm reasonably

15:39:37 1 confident it will plead out. So I think that will be
2 available.

3 I've got a very large criminal case which is
4 scheduled to start January 23rd. If it goes, that will take
15:39:56 5 three weeks or a month. I just don't know if that's going to
6 go. But we could have probably another hearing the week
7 before that, maybe on January 19th.

8 February, the second half of the month I'm going to
9 be in a civil trial that's going.

15:40:23 10 March is relatively open.

11 April is completely booked.

12 And May I have some flexibility.

13 My thought coming in today was that I would like to
14 try the first bellwether case in March because it's a pretty
15:40:42 15 open month. The question in my mind is can we get through all
16 of these motions and get them decided by March, just because
17 of the rest of my docket.

18 If we held -- tell me if I'm crazy on this. If we
19 held a hearing on November 17th, on December 15th, on
15:41:09 20 January 19th, then that would have us hearing, if we're going
21 to do the preemption motion and the 13 *Daubert* motions and the
22 three disqualification motions and the first one or two
23 bellwether summary judgment motions, that's 16 motions. That
24 means we'd be arguing five or six each month. I just don't
15:41:37 25 know if I'll be able to get ready for all of that given how

15:41:42 1 the rest of these months are filled in. But that would be one
2 possibility.

3 Another possibility would be to say we'll do the
4 first bellwether trial in May, which would give us more time
15:41:53 5 for the motions to be decided, but that's pushing us,
6 obviously, later into the year.

7 By the way, Judge Brodman told me you all have a
8 trial scheduled in front of him on August 6th and he intends
9 to hold that trial date. So that's going to interfere with
15:42:08 10 our ability to do bellwether trials, I presume, because I
11 assume many of you will be involved in that.

12 So give me your thoughts in light of those calendar
13 realities.

14 MR. LOPEZ: Well, Your Honor, I don't know if this is
15:42:30 15 on the agenda --

16 THE COURT: Can't hear you, Mr. Lopez.

17 MR. LOPEZ: Apologize.

18 If we could get the Court to select, if you're in a
19 position to do that, the first two -- I think -- I think -- I
15:42:40 20 could be wrong, but I thought we were going to pick two and
21 those were going to be the ones we were going to focus our
22 attention on. Are we going to wait --

23 THE COURT: Two what?

24 MR. LOPEZ: Two of the five bellwether cases. Are we
15:42:52 25 going to wait for summary judgment on those and some of the

15:42:55 1 case-specific motions? Or might we lessen the load --

2 THE COURT: My intent is when we pick the dates to
3 plug in the trials. And what we'll need to do is set a final
4 pretrial conference. I assume there will be case-specific
15:43:11 5 motions in limine and other motions we'll need to address in
6 advance of that trial. So I think I intend to do that. But
7 the question is -- I mean, are you suggesting, depending which
8 we pick, we may not have to address some of these more
9 general --

15:43:24 10 MR. LOPEZ: Not right away. I mean, we can lessen at
11 least the immediate load if we can put three of the cases that
12 are not going to be in the first two, you know, kind of --

13 THE COURT: But don't -- isn't it almost certain the
14 *Daubert* motions will relate to the first two?

15:43:38 15 MR. LOPEZ: The *Dauberts* do. I mean, nothing's going
16 to affect the *Daubert* motions.

17 THE COURT: Those plus the motions to disqualify are
18 16 motions, and we've got the preemption motion. That's 17.
19 I don't see any way to avoid having to decide 17 motions
15:43:52 20 before the first bellwether trial.

21 MR. LOPEZ: No, that's true. That's true.

22 THE COURT: Okay. I interrupted you. Go on with
23 your thought.

24 MR. LOPEZ: I was just thinking, because I thought
15:44:03 25 you added the MSJ motions, too. But that's something you're

15:44:07 1 talking about doing as we're getting closer --

2 THE COURT: Right. Obviously it needs to be far
3 enough in advance so you all can frame the case, but I don't
4 see a reason to decide the motions for summary judgment on
15:44:17 5 Case Number 5 before we try Case Number 1.

6 MR. LOPEZ: Well, we want to keep the March date for
7 sure. And the August date I will tell you, Judge Brodman's
8 won't affect our ability to try a case here, or anywhere else
9 for that matter. Even remands of cases at that point. We've
15:44:36 10 got plenty of trial teams ready to try cases. So I wouldn't
11 let that date affect us, at least. I cannot speak for defense
12 counsel. They may not have the same ability to do that. But
13 we're ready to try more than one case at any given time
14 anywhere. So we've kind of mapped out what that might look
15:44:54 15 like next year and we're prepared to have trial teams ready to
16 do that. We could -- the number's large. 25 to 30 cases
17 we're hoping to get tried next year in state court, early
18 remands and the like.

19 But obviously preemption is one we'd like the Court
15:45:14 20 to address first. And then Dr. Kessler is important. I'll
21 tell you why. A lot of people depend on and rely on
22 Dr. Kessler's findings, his factual -- the bases of his
23 opinions, including some of the defense lawyers -- I mean
24 defense experts actually have said they didn't need to look at
15:45:35 25 the internal corporate documents because they relied on

15:45:37 1 Dr. Kessler because he was so thorough in his review and spent
2 hundreds of hours, which might explain his bill. He actually
3 spent 700 hours, 770 hours, working on the case.

4 But I mean I understand that's -- I would say for the
15:45:55 5 parties, I can speak for the plaintiffs, it won't overburden
6 us if we could spread all 15 or 16 of those over three
7 hearings. But I --

8 THE COURT: I'm not worried about you.

9 MR. LOPEZ: I didn't think so.

15:46:08 10 THE COURT: I'm not worried about them.

11 MR. LOPEZ: Okay.

12 THE COURT: We have a two-person law firm here that
13 has 400 other cases and a lot of things scheduled. The
14 question is can I do justice to those motions and get it done
15:46:22 15 by March.

16 MR. LOPEZ: Well, I guess the only thing I can say,
17 Your Honor, we'd like to, if the Court can handle that many
18 motions over three hearings, we would like to keep that March
19 date if we could.

15:46:34 20 THE COURT: Okay.

21 MR. NORTH: Your Honor, we are perfectly fine with
22 the March date also and would like to see if we could, of
23 course if the Court is able to do that.

24 It may not be as intimidating as it sounds in the
15:46:50 25 number of motions because there is a lot of overlap. I can

1 think of three *Daubert* motions that essentially raise the same
2 issue, for the most part. The two motions to disqualify are
3 the same legal standard, slightly different facts but the same
4 legal standard. Those two can be treated in tandem, I think,
5 quite easily.

6 My suggestion would be we maybe plan with these
7 dates, that we come up with a scheme in the next week or so,
8 if not sooner, to, in collaboration Mr. Stoller and I can talk
9 about how to group these, maybe, over the three hearings, and
10 then the Court can look at that and see if you think that's
11 feasible. Maybe we can do a little blurb as to why we think
12 these motions are related to each other or there might be some
13 efficiencies that way.

14 MR. LOPEZ: I actually think that's a really good
15 idea. I didn't think about the fact you're going to see a lot
16 of the same stuff in a lot of these motions. It's not like
17 you're going to put this aside and start with a whole new set
18 of facts and law and things. We could do that. We could side
19 by side -- actually, it may look -- may make five motions look
20 like two to you, Your Honor, because the issues do overlap.
21 So just give us a time when you'd like us to make that
22 proposal and we'll get it to you.

23 THE COURT: All right. Let's then set hearings for
24 Friday, November 17th at 1 p.m., Friday December 15th at 1
25 p.m., and Friday, January 19th at 1 p.m. for hearings,

15:49:40 1 recognizing that the 15th may get bumped if that criminal
2 trial goes.

3 And what I'd like to do is have you by a week from
4 Friday, if you can, a week from tomorrow, propose the best
15:49:58 5 grouping -- if you can jointly, that would be great -- on how
6 to address these motions, both in terms of what's going to be
7 most informative to you all as we work toward a March trial
8 date, but also what you think is going to be the best
9 allocation of workload. We'll be looking at the same issue.

15:50:23 10 I do think we should address the preemption motion at
11 the November 17th hearing and get that decided up front. But
12 we can do more than that, I think, at that hearing. And if
13 you can get me by a week from Friday your suggestions, then
14 we'll look them over and issue an order that actually sets out
15:50:40 15 the schedule.

16 When we talked about the trials, I think the thought
17 was we needed three weeks for each trial. Is that still the
18 case?

19 MR. LOPEZ: Yes, Your Honor.

15:51:07 20 MR. NORTH: Yes, Your Honor.

21 THE COURT: Because of our criminal docket, I usually
22 have ten or so sentencings on Mondays so I try not to schedule
23 trial days on Mondays. We can do it if we need to, but it
24 really jams up sentencings the weeks before and after.

15:51:31 25 Can we do three weeks of trial if we're doing four

15:51:34 1 hours -- I mean four days per week, five and a half hours of
2 trial time per day? So that would be 22 hours of trial time a
3 week. 66 hours total trial time for the cases. Is that
4 workable?

15:51:53 5 MR. LOPEZ: That works for us, Your Honor.

6 MR. NORTH: Yes, Your Honor.

7 THE COURT: Okay. Then let's set the first
8 bellwether trial for Tuesday, March 13th, and we will hold the
9 13th through the 16th, the 20th through the 23rd, and the 27th
10 through the 30th for that trial.

11 Traci, do you see any problems with that?

12 THE COURTROOM DEPUTY: No. We're fine.

13 THE COURT: And that means that we will need to set a
14 final pretrial conference ahead of that. I think I'd like to
15 do that at the November 17th hearing because I will have a
16 better sense for what else is on the calendar. As I
17 mentioned, I'm going to be in another civil trial in the last
18 half of February that I'm sure is going.

19 So we'll hold those trial days and work toward being
15:53:24 20 ready for that in terms of the other motions that we're going
21 to resolve.

22 I don't want to today put -- well, maybe we should.

23 I think what I'd like to do --

24 Is Szilagyi scheduled to start on June 5th?

15:53:54 25 (The Court and the courtroom deputy confer.)

15:54:08 1 THE COURT: All right. I think I'd like to set the
2 second bellwether trial to go May 15th through the 18th, 22nd
3 through the 25th, and 29th through June 1st.

4 Defense counsel, can you try a case that overlaps what's
15:54:44 5 happening in state court? I'm just wondering how much we need
6 to steer around what Judge Brodman's going to be doing.

7 MR. NORTH: You know, ideally we'd prefer not to, but
8 we can if we need to.

9 THE COURT: All right. I've got several big, complex
15:55:16 10 criminal cases. I don't know when I'm going to have to set
11 those in 2018 for trial, so I'll wait to set the third
12 bellwether trial until I have a clearer picture on that. And
13 there is a possibility, which I will try to avoid, that the
14 May date could get bumped by one of those big, complex
15:55:32 15 criminal cases, which takes precedence. But I don't know yet
16 for sure which are going and exactly when they'll be ready.

17 I would like to make the November 17th hearing
18 another status conference as well. So we will put in the
19 order that comes out after today that you should file a status
15:55:53 20 report ahead of that so we can just talk about where we are in
21 the case.

22 In terms of the two bellwether trials to be tried in
23 March and May, I didn't go back and read the bellwether order
24 about what we said about picking which goes first. Remind me
15:56:14 25 what's in that order.

15:56:15 1 MR. NORTH: Your Honor, I'd have to go back and
2 figure out which order it is, but I believe the Court in a
3 footnote in choosing the bellwether cases suggested the Jones
4 case would go first, most likely, and the Booker case would go
15:56:27 5 second.

6 THE COURT: Anybody remember which case management
7 order that was?

8 MR. LOPEZ: I don't remember the order, but I
9 remember the Booker and Jones cases.

15:56:36 10 MR. NORTH: Your Honor, I can find it in one second
11 here.

12 MR. LOPEZ: If it says that, I read it the other way.

13 THE COURT: Let me read -- let me find it.

14 It is Case Management Order Number 23. I picked five
15:56:55 15 bellwether trials: Mulkey, Hyde, Jones, Kruse, and Booker.

16 MR. NORTH: My recollection it was a footnote.

17 THE COURT: I said in Footnote 1, "Although the Court
18 declines to order the trials now, it makes sense to try Jones
19 and Booker first in order to facilitate a more informed
15:57:16 20 selection of the sixth case."

21 And I think -- well, I won't try to recreate my
22 thinking.

23 What are your thoughts on that, Jones and Booker as
24 the first two?

15:57:25 25 MR. LOPEZ: Well, I noticed the word "first" came

15:57:27 1 right after the word "Booker," so that would be --

2 THE COURT: "Jones and Booker first."

3 MR. LOPEZ: Oh, comma "first."

4 THE COURT: No, no comma.

15:57:38 5 MR. LOPEZ: No comma. All right. Then Booker first.

6 THE COURT: I think those are the two cases we ought
7 to try first.

8 You want Booker?

9 MR. LOPEZ: Yes, Your Honor.

15:57:44 10 THE COURT: You probably want Jones?

11 MR. NORTH: I want Jones, Your Honor, because
12 Booker's the only one of the five with an open surgery, which
13 represents such a small percentage of the overall MDL. We all
14 on our side want to try a nonsurgical case because that's the
15:57:59 15 vast majority of the inventory.

16 THE COURT: Is there a particular reason you think
17 Booker should go first?

18 MR. LOPEZ: Well, I mean, there are a lot of reasons.
19 The reason you do bellwether cases is to see whether or not
15:58:23 20 the cases are going to lead to something other than continue
21 to try 27 other cases over the next century.

22 So Booker's a G2. Jones is Eclipse. I mean, G2 has
23 a seven-year history of devices on the market, maybe eight.
24 It sold way beyond the time it got taken off the market.

15:58:46 25 That's probably 50 percent of the cases filed. I know even in

15:58:49 1 cases that --

2 THE COURT: We're going to try them both. Why does
3 this matter to the two sides?

4 MR. LOPEZ: It matters because if we're looking at
15:58:58 5 the rationale for trying -- we'll get a good value of a G2
6 case.

7 THE COURT: We're going to try it as one of the first
8 two. I'm just -- I have a coin.

9 MR. LOPEZ: Oh, we do?

15:59:10 10 THE COURT: Yeah. Heads we'll try Jones first,
11 Booker we'll try -- I mean heads we'll try Jones first, Booker
12 we'll try tails first. No.

13 MR. LOPEZ: It's like heads I win, tails you lose.

14 THE COURT: Heads we try Jones first, tails we try
15:59:27 15 Booker first. All right?

16 Want me to re-flip it?

17 Heads Jones, tails Booker.

18 It is tails. Booker first.

19 That's an indication how important I thought that
15:59:40 20 decision was.

21 We're going to try them both, and we're going to try
22 them both within a three-month period. You'll have verdicts
23 in the two.

24 Okay. So which one just won? Booker, right?

15:59:57 25 MR. LOPEZ: Booker.

15:59:58 1 THE COURT: We'll try Booker in March, Jones in May.

2 And factor that in as you think about the order in
3 which we should address these motions at the three hearings
4 that are coming up in November, December, and January.

16:00:23 5 What else do we need to address?

6 Oh, I know what we need to address. We need to
7 address the question of other judges trying bellwether cases.

8 Whether I can try the third bellwether case really
9 depends on what happens to the rest of my docket from the
16:00:56 10 first two, so I won't make that decision until probably early
11 next year. We'll try to pick a date in November. I am
12 guessing there are some judges in this courthouse that would
13 take the case. We've got a number of senior judges who could
14 help out. If not, we can bring somebody in.

16:01:17 15 What we do at the next two, my thought we ought to
16 address that as we get closer to the beginning of the year.
17 If we can try all five cases in 2018, that would be great.
18 But I will tell you now, if we do that it will need to be with
19 the help of some other judges.

16:01:36 20 I don't know that we need to slay that dragon today.
21 Why don't we plan to address that as we get closer to 2018.
22 And I'm certainly open to having other judges come in. I
23 would rather get other judges to help and get them tried more
24 quickly than do them all myself and stretch it out into 2019
16:01:52 25 if we can avoid it just because I think it would be helpful to

16:01:57 1 get the bellwethers resolved.

2 Are there any other matters that we need to address?

3 MR. STOLLER: Judge, do you want to set a pretrial
4 conference date on Jones now that we have a trial date --

16:02:08 5 MR. LOPEZ: He meant Booker.

6 MR. STOLLER: No, he's going to set the pretrial
7 conference at the next hearing for Booker. I'm looking
8 further ahead.

9 THE COURT: You mean set the one in May now? No, I
16:02:21 10 don't. I'll need to work around my schedule when we set that.

11 Anything else from anybody?

12 MR. NORTH: Nothing from the defendants, Your Honor.

13 MR. LOPEZ: Thank you, Your Honor.

14 THE COURT: Okay. Thank you all.

16:02:34 15 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 13th day of October, 2017.

s/ Patricia Lyons, RMR, CRR
Official Court Reporter